90-1597

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
WESTINGHOUSE ELECTRIC CORPORATION,
and ROY E. GRIFFIS,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, which was filed in 1984, the Supreme Court of Oklahoma held that Oklahoma's retaliatory truck taxes violated the Commerce Clause because they discriminated on their face against out-of-state motor carriers, but limited the effect of its decision to periods after June 23, 1987 and denied refunds of all taxes paid for earlier periods because of the cost such refunds would impose on the State. The questions presented are:

1. Whether financial cost to a state can justify a State court's refusal to refund taxes collected under a clearly unconstitutional statute.

2. Whether state courts may apply a "presumption" that their decisions invalidating state taxes on federal constitutional grounds shall apply only prospectively.

3. Whether a State's violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983.

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[1] National Private Truck Council, Inc. is a trade association and has no subsidiaries. The non-wholly owned subsidiaries of Westinghouse Electric Corporation are listed in App. H.

[2] Respondents are the Oklahoma Tax Commission and the following members of the Commission: Robert E. Anderson, Chairman, Robert L. Wadley, Vice Chairman, and Don Kilpatrick, Secretary-Member. The individual respondents are successors in office to other officials whom petitioners had sued in their official capacities for declaratory and injunctive relief.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma issued on June 28, 1990 (App. A, *infra*) is not yet reported. A Corrected Order issued September 27, 1990 amending the June 28, 1990 opinion (App. B, *infra*) is not yet reported. An Order of Clarification issued March 5, 1991 amending the June 28, 1990 opinion (App. C, *infra*) is not yet reported. The opinion of the district court of Oklahoma County (App. D, *infra*) is not reported. The decision of the district court of Oklahoma County denying petitioners' motion for a preliminary injunction or escrow is set forth in App. E and App. F, *infra*.

JURISDICTION

The judgment of the Supreme Court of Oklahoma (App. A, *infra*) was entered on June 28, 1990. Timely petitions for rehearing were granted and the Supreme Court of Oklahoma issued amended judgments on September 27, 1990 (App. B, *infra*) and March 5, 1991 (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> * * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pertinent provisions of Oklahoma's retaliatory tax statute, 47 O.S. 1986 Supp. § 1120(K) and 68 O.S. 1982 Supp. § 607.1, are set forth in App. G, *infra*.

STATEMENT

In this case petitioners filed a class action suit in Oklahoma state court on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Oklahoma imposed on motor carriers who operated trucks in Oklahoma that were registered in certain other states. Trucks registered in Oklahoma were exempt from the taxes. Although the trial court acknowledged that the taxes were probably unconstitutional, it denied petitioners' motion for a preliminary injunction against their collection, or alternatively, for an order requiring them to be held in escrow because it felt that the merits of the action could be promptly decided. (App. 37a-38a.) Two years later, another judge of the same court finally ruled on petitioners' summary judgment motion, denying it and upholding the constitutionality of the taxes. (App. 31a-36a.) Three and a half years later, on petitioners' direct appeal, the Supreme Court of Oklahoma reversed the trial court and held that the taxes were "obviously" unconstitutional on their face (App. 13a), because they "violate the fundamental requirement of nondiscrimination against interstate commerce." (*Id.* at 25a.) The court also held that petitioners were entitled under Oklahoma law to maintain a class action for refunds of the taxes paid. (*Id.* at 18a-20a.) The court, however, held that its ruling on the merits would only be given prospective effect from June 23, 1987 (when this Court decided another truck tax case, *American Truck-*

ing Associations, Inc. v. Scheiner, 483 U.S. 266 (1987)), and it denied petitioners' claims for refunds of all taxes paid for periods before that date. (*Id.* at 24a.)

A. Oklahoma's Retaliatory Taxes

Oklahoma, like most other states, imposes a variety of fees and taxes on motor carriers operating in the state, such as fees for the registration of vehicles and taxes for the use of fuel in the state. In addition, in 1982 Oklahoma enacted two statutes, 47 O.S. 1986 Supp. § 1120(K) and 62 O.S. 1982 Supp. § 607.1, which authorized respondents to levy additional taxes, commonly known as "retaliatory taxes," which were imposed only on carriers operating vehicles in Oklahoma that were registered in certain other states and were not imposed on Oklahoma-registered vehicles. (App. 5a.) The purpose of these statutes was to retaliate against states imposing so-called "third structure taxes," [3] which certain states have imposed on all motor carriers operating in those state, including Oklahoma registered carriers, and to which Oklahoma objected. These statutes carried out this purpose by authorizing respondents to impose taxes on carriers registered in those states that operate in Oklahoma which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing

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[3] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes "so-called "first structure" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Oklahoma and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

carriers from third structure tax states, Oklahoma's legislature hoped to pressure the legislatures of those states to repeal their third structure taxes or to exempt Oklahoma-based carriers from them.

Respondents implemented these statutes in 1983 by imposing retaliatory taxes on carriers with trucks operating in Oklahoma that were registered in 25 states.[4]

B. Proceedings Below

Petitioners are the National Private Truck Council, Inc. ("NPTC"), Westinghouse Electric Corporation, and Roy Griffis. NPTC is the national trade association of "private carirers"—companies that own and operate their own truck fleets primarily in furtherance of their non-transportation businesses. NPTC is the successor to the Private Truck Council of America, Inc., which was the original lead plaintiff in this suit and in six other suits which successfully challenged retaliatory taxes imposed by other states.[5] Westinghouse Electric Corporation is the successor to the rights of its former subsidiary Circle W Transportation, which operated 15 Pennsylvania registered trucks in Oklahoma and therefore paid $1,080 in retaliatory taxes to Oklahoma in 1984. Roy Griffis is

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[4] These are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Nevada, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[5] *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988); *Dennis v. Nebraska*, 234 Neb. 427, 451 N.W. 2d 676 (1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 111 S.Ct. 865 (1991).

an unincorporated "owner operator" residing in Bearden, Arkansas. Griffis paid $185 in retaliatory taxes to Oklahoma in 1984. (App. 3a.)

Petitioners filed a complaint in the District Court for Oklahoma County on December 17, 1984 as a class action seeking injunctive and declaratory relief and refunds. The complaint alleged that Oklahoma's retaliatory tax statutes discriminated on their face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983. Upon filing the complaint, petitioners moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.[6]

After a hearing on January 29, 1985, District Judge William S. Myers, Jr. denied petitioners' motion because he found that an expedited decision on the merits of the case could be secured and because he found that the taxpayers would have an adequate remedy at law (*i.e.*, for refunds if they prevailed.) (App. 38a.) At the hearing, Judge Myers made clear his view on the merits of the controversy, however, and the appropriateness of a prompt disposition on the merits, stating (App. 41a):

> I think that ultimately, these taxes, where a state imposes a burden on interstate commerce to get even for what has been done to its truckers, will be struck down and will cease to exist.
>
> I think ultimately, the plaintiffs will probably prevail in this case. . . .
>
> * * * *

[6] Escrow orders have often been issued in suits of this kind. Justice Blackmun issued such an order in *America Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1310 (1987).

> I am most confident that there will be an appeal from either party who does not prevail when the matter is ultimately decided on the merits by the assigned judge and this should take place, I would think, within the next thirty to sixty days considering the speed with which such matters are decided.

Judge Myers' prediction proved to be overly optimistic. On February 14, 1985 plaintiffs filed a motion for summary judgment with a supporting memorandum of points and authorities, and briefs in opposition thereto were filed by respondents in March 1985. The case was assigned for decision to District Judge John Amick. Two years later, without having heard oral argument, Judge Amick issued a short "Memorandum Opinion" finding Oklahoma's retaliatory taxes to be constitutional. (App. D.) Judge Amick noted that the Supreme Court of Maine had invalidated Maine's retaliatory motor carrier tax in 1986, but chose instead to follow a 1972 decision by the New Jersey Court of Chancery which had upheld retaliatory truck taxes imposed by the State of New Jersey. *B&L Motor Freight, Inc. v. Heymann*, 293 A.2d 711 (Ch. Div. 1972), *aff'd without opinion*, 311 A.2d 184 (App. Div. 1973), *cert. denied*, 317 A.2d 707 (N.J. 1974), *appeal dismissed*, 419 U.S. 1042 (1974), *overruled* in *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988).

Petitioners appealed to the Oklahoma Supreme Court. More than three years later, on June 28, 1990 that court issued a decision reversing Judge Amick. (App. 1a-25a.) The court held, "The questioned statutes are plainly discriminatory" and thus violate the Commerce Clause under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 271, 279 (1977). (*Id.* at 11a-16a.) The court stated: "Obviously . . . Oklahoma's retaliatory taxes do not pass the third and fourth prongs [of the *Complete Auto* test]." (*Id.* at 13a.) Because the challenged taxes applied on their face only to out-of-state carriers, the

court held that the taxes violated "[t]he essential tenet of the Commerce Clause" established in cases like *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959), *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) and *Maryland v. Louisiana*, 451 U.S. 725 (1981) (*Id.* at 12a-14a.) The court further held that the tax was not justified by its retaliatory purpose. Citing *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) and *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), the court concluded:

> Discrimination cannot be corrected by retaliatory discrimination. Retaliatory legislation, designed to motivate a sister state to cease its allegedly unconstitutional tax burden on interstate commerce, has no legitimate state purpose and is a wholly unacceptable legislative remedy.

(*Id.* at 15a.)

With respect to a remedy, the court held that petitioners are entitled under the pertinent Oklahoma tax refund statute to recover refunds of unconstitutional taxes on a class-wide basis. (*Id.* at 17a-20a.) However, the court ruled that its holding would operate "quasi-prospectively from the date of the *Scheiner* decision" . . . i.e. from June 23, 1987. The court did not explain how the decision in *Scheiner*, which concerned the constitutionality of facially neutral taxes, was related to the constitutionality of facially discriminatory taxes like those at issue in this case, but it concluded that denying refunds of taxes paid before *Scheiner* was warranted because of the "significant financial hardship upon the State in exercising its governmental functions" if full retroactive effect were given to its decision and because of a supposed "presumption of prospective application of state court decisions invalidating tax statutes." (*Id.* at 24a.)[7]

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[7] On the basis of a statement in respondents' brief, the court below stated: "Nearly $12,000,000 was collected under the statutes

The Oklahoma Supreme Court also briefly addressed and dismissed petitioners' claim under 42 U.S.C. § 1983 and their associated claim for attorneys' fees under 42 U.S.C. § 1988, citing *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) and other decisions (App. 24a-25a), all of which this Court overruled in *Dennis v. Higgins*, 111 S.Ct. 865 (1991).

The court remanded the case and directed the Oklahoma Tax Commission to determine the amount of taxes "collected after June 23, 1987" and to deposit that sum, plus interest, in an escrow account for subsequent distribution to taxpayers. (App. 25a.) Respondents petitioned for rehearing on the merits and also on the scope of the remedy. Respondents pointed out that *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990), held that the *Scheiner* decision is to operate prospectively for *tax periods* occurring after the date of the decision without regard to when the tax was paid or collected. Petitioners opposed the petition for rehearing but agreed with respondents' point regarding the *Smith* case. On September 27, 1990 the Oklahoma Supreme Court issued a "Corrected Order" which amended the June 28, 1990 opinion to require refunds of all taxes collected "for the tax year 1987" and thereafter. (App. 26a-27a.) Respondents and petitioners then jointly petitioned for a further rehearing, pointing out that the term "the tax year 1987" was ambiguous and inappropriate in connection with the taxes at issue, some of which were assessed on the basis of three month periods, and others of which were assessed on the basis of twelve month periods commencing April 1 or July 1 of each year.[8] On March 5, 1991 the court

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from April, 1983 [when they were first implemented] through October, 1987." (App. 17a.) Presumably somewhat less was collected with respect to the tax period prior to June 23, 1987.

[8] In joining respondents in petitioning for rehearing to correct the ambiguity in the order, petitioners made it clear that they

issued a further Order of Clarification which directed respondents to refund taxes paid "for tax periods or portions of tax periods occurring after June 23, 1987." (App. 28a-30a.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS RECURRING AND IMPORTANT ISSUES WARRANTING THIS COURT'S REVIEW

The decision of the Oklahoma Supreme Court limiting petitioners' entitlement to refunds of taxes described by that court itself as "obviously" unconstitutional presents two recurring issues of far-reaching importance: (1) can financial cost to the state justify a state court's refusal to refund taxes exacted under a clearly unconstitutional statute, and (2) can state courts deny such refunds on the basis of a "presumption of prospective application of state court decisions invalidating tax statutes"? Petitioners submit that the Oklahoma Supreme Court's affirmative answers to those questions are directly in conflict with this Court's decisions and would seriously weaken the protections provided to citizens by the United States Constitution. It is apparent from the decision below and other recent state court decisions, however, that some state courts believe that this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and other decisions permit them to deny or limit the retroactive effect of constitutional adjudications for no other substantial reasons than the financial cost of refunds to the state or a supposed "presumption" of prospective application for their decisions.[9]

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believed that no limitation on the retroactive effect of the decision was appropriate and were in no way retreating from that position.

[9] *See, e.g., National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, *appeal dism'd* and *cert. denied*, 486

The effect of the decision in this case is to deny approximately $10 million in refunds to several thousand interstate motor carriers. Because those carriers are barred by the Eleventh Amendment from instituting refund suits in federal courts, this Court's review is essential to ensure that their federal rights are not improperly subordinated to the narrow interests of particular states.

Furthermore, if the decision below is permitted to stand, there can be no doubt that it will quickly spawn a large progeny of state court decisions finding that the financial needs of their states provide equally valid justification for denying monetary relief to individuals injured by violations of the federal Constitution. It will also send a clear message to states and state courts that states can not only limit their financial exposure but also *profit* substantially from obviously unconstitutional measures by simply not adjudicating challenges to them for five or six years.

U.S. 1040 (1988); *Solario v. Glaser*, 461 A.2d 1100 (N.J.), *cert. denied*, 464 U.S. 993 (1983); *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), *review granted*, No. 89-680; *First Bank v. Deer Park Independent School Dist.*, 770 S.W.2d 849 (Tex. App. 1989); *National Distribution Co. v. Office of Comptroller*, 523 So.2d 156 (Fla. 1988); *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 335 S.E.2d 873 (1985); *aff'd*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Metropolitan Life v. Com'r of Insurance*, 373 N.W.2d 399 (N.Dak. 1985); *Board of Com'rs v. Du Page County*, 103 Ill.2d 422, 469 N.E.2d 1370 (1984); *Bond v. Burrows*, 103 Wash.2d 153, 690 P.2d 1168 (1984); *Solomon v. Atlantis Development, Inc.*, 483 A.2d 253 (Vt. 1984); *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976); *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *rev'd*, 110 S.Ct. 2238 (1990); *Ashland Oil Corp. v. Rose*, 350 S.E.2d 531 (W.Va. 1986), *rev'd sub nom. Ashland Oil Corp. v. Caryl*, 110 S.Ct. 3202 (1990).

II. THE OKLAHOMA SUPREME COURT'S LIMITATIONS OF RETROSPECTIVE RELIEF ON THE BASIS OF FINANCIAL COST IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS

When a decision "establish[es] a new principle of law, either by overruling prior precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron Oil Co. v. Huson*, 404 U.S. at 106-107), then the financial impact of its retroactive application on the parties is one factor that may be appropriately considered in deciding whether to give the decision only prospective application. *See, e.g., American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990). Where, as in this case, a decision invalidates a state tax under well settled constitutional principles, however, this Court's decisions establish that financial cost does not justify the state's refusal to apply the decision retroactively or its refusal to provide meaningful relief.

In this case, there can be no question that Oklahoma's retaliatory taxes were clearly unconstitutional under principles that were well settled even when they were enacted in 1982; indeed, the Oklahoma Supreme Court seemed to recognize as much. Although that court invoked the *Scheiner* decision as a reason for limiting petitioners' remedies to periods after June 23, 1987, in fact the *Scheiner* decision had no bearing whatever on the constitutionality of the taxes in this case, and the court made no attempt to show otherwise. The only similarity between the two cases is that they both involved truck taxes that were found to discriminate against interstate commerce. *Scheiner*, however, involved taxes that were facially neutral—*i.e.*, that applied in equal amounts to all trucks operating in the taxing state regardless of the state of origin or vehicle registration. The issue in *Scheiner* was whether such taxes were discriminatory *in effect* because they did not vary with the miles of opera-

tion, and in concluding that such taxes were discriminatory, the Court squarely overruled a fairly recent line of decisions upholding such taxes.

The retaliatory taxes in this case, in contrast, discriminated on their face against out-of-state trucks and were clearly unconstitutional under an unbroken line of precedent long predating *Scheiner*. Indeed, the court below correctly *cited* and relied upon such decisions as *Boston Stock Exchange*, *Maryland v. Louisiana*, *Northwest States Portland Cement*, *Travis v. Yale & Towne Mfg. Co.*, and *Great Atlantic and Pacific Tea Co. v. Cottrell*, *supra*, in support of its conclusion that Oklahoma's retaliatory taxes were "plainly discriminatory" and "obviously" unconstitutional (App. 11a, 13a), as did the Supreme Court of Maine in 1986 and the Supreme Court of New Hampshire in 1987 in voiding similar retaliatory truck taxes.[10] In fact, this Court in *Scheiner* also noted the existence of retaliatory taxes like Oklahoma's and their obviously disruptive effect on interstate commerce (483 U.S. at 285), but the decision in *Scheiner* is not what rendered them unconstitutional. As the decision below itself shows, that was aprent long before *Scheiner*.

In short, the *Scheiner* decision itself provides no basis for limiting the retrospective effect of the decision below to periods after June 23, 1987. Accordingly, the questions presented by that decision are whether any such limitation is justified by the financial cost to the state or by a supposed presumption of prospective application for state court tax decisions. Under the decisions of this Court, discussed below, petitioners submit that those grounds do not justify a state court's refusal to provide a meaningful retrospective remedy for a deprivation of federal constitutional rights.

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[10] *Private Truck Council of America, Inc. v. Sec'y of State*, *supra*; *Private Truck Council of America, Inc. v. New Hampshire*, *supra*.

A. Financial Costs Do Not Permit States To Deny Redress For Deprivations Of Well Established Constitutional Rights

That states cannot invoke financial costs to defeat their duty to redress deprivations of federal constitutional rights was squarely reaffirmed last term in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), in which the Court reversed the Florida Supreme Court's refusal to order retroactively refunds of an unconstitutional liquor tax. This Court stated:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

110 S.Ct. at 2247 (footnotes omitted). The Court further held that while refunds might "cause serious economic and administrative dislocation for the State," such effects could not counter the State's due process obligation. The Court stated that, "the State's interest in financial stability does not justify a refusal to provide relief." *Id.* at 2257. The Court explained:

> We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds.

Id. at 2557, n.35.

Similarly, in *Ashland Oil, Inc. v. Caryl*, *supra*, the Court rejected the State of West Virginia's argument that a prior decision invalidating an unconstitutional tax, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), should apply only prospectively under the test established in *Chevron Oil Co. v. Huson*, *supra*. The Court held that *Armco* must be applied retroactively because it did not establish a new principle of law, and therefore did not meet the first and threshold prong of the test in *Chevron Oil*. Because the tax was invalid under settled principles, the Court declined to consider arguments going to the other prongs of *Chevron*, including claims regarding the financial cost of refunds to the state.

In this case, the Oklahoma Supreme Court struck down what it correctly described as an "obviously" unconstitutional tax on the basis of seventy years of cited precedents dating back to this Court's decision in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), but refused to order refunds of any taxes paid before June 23, 1987—even of taxes paid after this suit was filed in 1984 and after the trial court refused petitioners a preliminary injunction on the basis of their supposedly adequate remedy at law—simply because it felt that refunding those taxes would impose "significant financial hardship on the State in exercising its governmental functions." (App. 24a.) That decision, if permitted to stand, would effectively eviscerate the constitutional protections established in *McKesson*, *Ashland Oil* and other decisions of this Court.[11]

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[11] Even if there were circumstances in which the financial hardships of remedying a clearly unconstitutional deprivation would justify refusing the remedy, those circumstances are plainly not present here. The $10 million or so in refunds at issue in this case, while not insignificant, would certainly not impose an extraordinary hardship on the State of Oklahoma.

B. There Is No "Presumption Of Prospective Application Of State Court Decisions Invalidating Tax Statutes"

The Supreme Court of Oklahoma also appeared to believe that its limitations of retrospective relief was justified by an asserted "presumption of prospective application of state court decisions invalidating tax statutes . . . .," citing *National Can Corp. v. State of Washington Dept. of Revenue*, 749 P.2d 1286, 1292-93 (Wash. 1988) for the same proposition.

The proposition that state court decisions invalidating tax statutes are "presumptively" prospective in application has far reaching implications, because it would reverse, at least in the tax context, the normal presumptions that have been applied to judicial decision-making. As the Court has frequently noted, the general rule is that judicial decisions declaring constitutional and statutory rights have retroactive effect. *See, e.g., Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987). *Chevron Oil* and other cases have recognized an *exception* to the general rule in limited circumstances where a decision establishes a new principle of law and where other considerations support nonretroactive application. When a decision invalidates a state tax statute on the basis of well settled principles, however, *McKesson* and *Ashland Oil* indicate that the Due Process Clause *requires* the state to apply the decision retroactively and to provide a meaningful remedy for the constitutional violation. The view of the Supreme Courts of Oklahoma and Washington that state court decisions invalidating tax statutes are entitled to some "presumption of prospective application" appears to be at odds with those decisions; in any event it presents an extremely important question warranting this Court's review.

III. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT ALLOWING A CAUSE OF ACTION UNDER 42 U.S.C. § 1983 FOR A VIOLATION OF THE COMMERCE CLAUSE

In its decision below, the Oklahoma Supreme Court affirmed the trial court's dismissal of petitioners' cause of action under 42 U.S.C. § 1983 for a violation of the Commerce Clause, citing *Consolidated Freightways v. Kassel*, *supra*, and other lower court cases for the proposition that the Commerce Clause does not grant rights cognizable in a § 1983 action. The decision below directly conflicts with this Court's recent decision in *Dennis v. Higgins*, *supra*, which squarely held that a violation of the Commerce Clause will support a cause of action under § 1983. The *Dennis* decision specifically overruled *Consolidated Freightways* and the other lower court decisions on which the court below relied in denying petitioners' claim.

CONCLUSION

The petition for the writ of certiorari to the Supreme Court of Oklahoma should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On behalf of Themselves and all Others Similarly Situated,
Appellants,

vs.

OKLAHOMA TAX COMMISSION, *et al.*,
Appellees,

and

ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC.,
Intervenor.

Appeal from the District Court of Oklahoma County
Honorable John M. Amick, Trial Judge

[Filed Jun. 28, 1990]

Class action by and on behalf of non-resident motor carriers challenging the constitutionality of retaliatory/third-tier taxes imposed on non-Oklahoma residents operating foreign based motor carriers, pursuant to 47 O.S. 1986 Supp. § 1120(K) and 68 O.S. 1982 Supp. § 607.1. District court upheld constitutionality of challenged taxes, denied appellant's motion for summary judgment, including declaratory and injunctive

relief, tax payment refunds, costs and attorneys fees, and rendered final judgment for appellees.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

William B. Rogers & Associates,
By: William B. Rogers and
Ronald C. Palmatary,
Oklahoma City, Oklahoma, For Appellants,

Zuckert, Scoutt, Rasenberger & Johnson,
By: Richard A. Allen and
Andrew R. Plump,
Washington, D.C. For Appellants,

Oklahoma Tax Commission,
By: Joe Mark Elkouri and
Stanley Johnston,
Oklahoma City, Oklahoma, For Appellee,

Office of the Attorney General,
By: Thomas L. Spencer,
As Intervenor,
Oklahoma City, Oklahoma, For Appellee,

Kimball, Wilson & Walker,
By: Thomas G. Ferguson, Jr.,
Oklahoma City, Oklahoma, For Intervenor.

DOOLIN, J.

Appellants Private Truck Council of America, Inc., Circle W. Transportation, and Roy E. Griffis, (Truckers)[1]

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[1] Trucker, Private Truck Council of America, Inc., (PTCA), is a nonprofit business association incorporated in 1939 under the laws of New York, with its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies operating trucks and related equipment as private carriers. A large number of PTCA's member companies, operating in interstate commerce through Oklahoma, register their vehicles in states against which the Oklahoma Tax Commission retaliates under the authority con-

have challenged the constitutionality of 47 O.S. Supp. 1986 § 1120(K) and 68 O.S. Supp. 1982 § 607.1. The questioned statutes impose fees and taxes on out of state motor carriers, operating in Oklahoma, in the same manner and extent that Oklahoma based motor carriers are taxed in other states. The pivotal issue presented is whether 47 O.S. § 1120(K) and 68 O.S. § 607.1 discriminate on their face against interstate commerce and nonresident motor carriers in violation of both the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1. Other issues before this Court are whether Truckers are entitled to reimbursement of litigation expenses and reasonable attorneys' fees, and whether Truckers are entitled to refunds, and if so, whether retroactive or prospective application is appropriate.

I. Factual Background

In its overall taxing scheme, the State of Oklahoma imposes several fees and taxes on all motor carriers operating within its borders. At the "first tier", the State

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tained in §§ 1120(K) and 607.1. PTCA's principal purpose is to protect and promote the interests of its members by a variety of activities, including disseminating information, undertaking educational activities, lobbying Congress and state legislatures on regulatory issues affecting private carriers, and engaging in litigation of this kind on behalf of its members.

Trucker, Circle W, a subsidiary of Westinghouse Electric Corporation, provides transportation primarily for that company throughout the nation, with fifteen vehicles that are registered in Pennsylvania. Those vehicles paid Pennsylvania's annual $36.00 per axle tax, and accordingly were also subject to Oklahoma's corresponding retaliatory tax. In 1984, for example, Circle W, through Westinghouse, paid Oklahoma $1,080.00 in mirror taxes.

Trucker, Roy E. Griffis and his wife, Freida Griffis, reside in Bearden, Arkansas, and began a trucking business in January 1984. The Griffises operate in several states, including Oklahoma. Their truck is registered in Arkansas, and accordingly they have paid Oklahoma's retaliatory tax of $175.00 per year and its retaliatory fuel marker fee of $10.00 per year.

imposes an annual registration fee, determined by the vehicle's total weight, for all trucks and related equipment operating in the State. 47 O.S.1985 § 1101 et seq. As a participating member of the International Registration Plan (IRP), an apportioned interstate registration system, Oklahoma also shares its registration fees for Oklahoma based-motor carriers, engaged in interstate commerce, with other participating IRP States, wherein the motor carrier travels. 47 O.S.1985 § 1120.

In return, Oklahoma receives a percentage of nonresident motor carrier's total registration fee which is determined by dividing the vehicle's actual mileage within Oklahoma by its overall total mileage for the preceding year. Thus, with respect to motor carriers engaged in interstate commerce, Oklahoma's total registration fees are determined by the vehicle's registration fee, and its percentage share of the vehicle's in-state mileage. 47 O.S.1985 § 1120(B). No Oklahoma motor carrier is required to pay more than one full registration fee, nor does the State impose registration fees against motor carriers based in non-IRP States. Although Oklahoma does not share its registration fees with non-IRP States, the appellee, Oklahoma Tax Commission, is "authorized and empowered to enter into and make reciprocal compacts and agreements" with non-IRP States. 47 O.S. 1985 § 1123.

At the "second tier", the State also imposes a tax on all motor carriers, regardless of their state of registration, for the use of motor fuel within the State. Additionally, a number of special excise taxes are imposed on the use of diesel fuel. 68 O.S. 1981 §§ 501 and 601 et seq.

Beyond the traditional registration fees and fuel taxes is a "third tier" tax. Such taxes are known as "mirror" or "retaliatory" taxes, and are also called "third structure" taxes. Third structure taxes are neither apportioned nor prorated, and examples include: ton-mile

taxes, based on the truck's weight and miles driven in the taxing state; axle taxes, a flat charge based on the number of axles on each vehicle; annual fuel marker fees, and trip fees.

In the instant case, retaliatory taxes and fees are imposed solely on certain nonresident motor carriers whose vehicles are registered in states that impose third tier taxes on heavy trucks registered in Oklahoma.[2] The Oklahoma Legislature, by enacting the "*mirror*" statutes in 1982, intended that registration and licensing fees, and motor fuel taxes "assessed against residents of other states operating similar vehicles in Oklahoma be comparably the same as the (fees and taxes) assessed against residents of Oklahoma operating a similar vehicle for a similar purpose in such other state." 47 O.S. § 1120 (K), and 68 O.S. § 607.1(D).

In 1983, the Oklahoma Tax Commission started imposing mirror fees and taxes against motor carriers with

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[2] Section 1120(K) provides in pertinent part:

> In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sale, use or milage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

Section 607.1 provides in pertinent part:

> In addition to those taxes or fees imposed by Articles 5, 6, and 7 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sales, use or mileage tax required by the laws of such other state making the same or similar use of a like vehicle in such state.

vehicles registered in 25 states.[3] The retaliatory taxes and fees, varying in amount, are wholly dependent upon the vehicle's state of registration, because the taxing scheme mirrors the fees and taxes imposed by that state as a condition precedent to the use of that state's highways by Oklahoma based carriers.[4] The revenues generated by these fees and taxes are distributed and used for the construction and maintenance of the highways and roads in the State of Oklahoma.

II. Procedural Background

Truckers filed this class action, on behalf of themselves and all other persons similarly situated, on December 17, 1984. With respect to the Commerce Clause, Truckers keenly recognized that a State may require persons engaged in interstate commerce to pay their fair share of state taxes.[5] However, Truckers argued that Oklahoma's retaliatory fees and taxes are a blatant and an egregious violation of the Commerce Clause, because they discriminate, on their face, against nonresident motor carriers. Truckers sought a declaratory judgment declaring Oklahoma's retaliatory statutes unconstitutional, and also requested a permanent injunction against collection of the challenged taxes, refunds of all taxes and fees paid by class members, and attorneys' fees and cost. After hav-

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[3] These are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Nevada, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[4] For example, because Arkansas imposed a nonapportioned flat-fee of $175.00 per year against resident and nonresident motor carriers, Oklahoma retaliated by imposing the same fees against Arkansas registered carriers doing business in the State. See Ark. Code Ann. tit. 27, § 27-35-205 (1983) (repealed 1987).

[5] *Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S.Ct. 2114, 2133, 68 L.Ed.2d 576 (1981).

ing its "class action" certified as such pursuant to 12 O.S. Supp. 1987, § 2023(B)(1)(b) and (B)(2), Truckers moved for summary judgment.

The Tax Commission argued that Truckers' frontal attack upon the constitutionality of Oklahoma's statutes could not be determined without a "cost impact" analysis. Since Truckers failed to produce any factual evidence showing actual damages, measured in dollars and cents, resulting from the alleged discriminatory intent or effect of the statutes, the Tax Commission urged the district court to reject Truckers' claim of facial unconstitutionality.

While not representing any party in this case, the Oklahom Attorney General and the Associated Motor Carriers of Oklahoma, Inc., were granted permission to intervene pursuant to 12 O.S. 1984, § 2024. Since the imposition of third structure taxes upon Oklahoma base-registered operators of motor carriers constitutes a barrier to conducting interstate business in that taxing state, both intervenors, and the Tax Commission asked the trial court to uphold the constitutionality of the disputed statutes, because the Oklahoma Legislature further promoted interstate commerce by equalizing the third tier taxation burden.

Finding "no disputed material issues of fact," the district court denied Truckers' motion for summary judgment. The court further upheld the constitutionality of both retaliatory statutes, and granted final judgment to the Tax Commission, as a matter of law. In its memorandum opinion, the district court expressly acknowledged that the Supreme Judicial Court of Maine had struck down Maine's reciprocal truck taxes as a violation of the Commerce Clause.[6]

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[6] *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), cert. denied, 476 U.S. 1129, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986).

Curiously, the district court also noted that the Maine Supreme Judicial Court had found unpersuasive, and "refused to accord any precedential value" to an earlier New Jersey trial court decision which upheld New Jersey's retaliatory truck tax.[7] The Maine Court found that "any significance accorded the Supreme Court's 1974 summary disposition of *B & L Motor Freight* must yield to supervening 'doctrinal developments.'" See *Private Truck Council*, 503 A.2d, at 218 n.7.

Nevertheless, our district court, relying on the United States Supreme Court's summary disposition of *B & L* to support its contention that "the matter was no longer open to question," concluded:

> It would seem that the view taken by the New Jersey Court is better reasoned and more in accord with the views of the United States Supreme Court.
>
> It is the actual effect on interstate commerce that we must consider, not the form of the statute. It seems to me that the purpose of the reciprocal laws is to motivate all states to abandon excessive taxes on out-of-state truckers, and I am not willing to say that such laws are either an undue burden on interstate commerce or that they violate the privileges and immunities clause.

Truckers appeal alleging that the district court erred in upholding the constitutionality of the challenged statutes. Truckers also contend that because the disputed statutes are facially unconstitutional, they are entitled to refunds of the fees and taxes collected and cost under the federal Civil Rights Act, 42 U.S.C. § 1983.

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[7] *B & L. Motor Freight, Inc. v. Heymann*, 120 N.J.Super. 270, 293 A.2d 711 (Ch.Div. 1972), aff'd mem., 125 N.J.Super. 372, 311 A.2d 184 (App.Div. 1973), certif. denied, 64 N.J. 494, 317 A.2d 707 (1974), appeal dismissed, 419 U.S. 1042, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974), reh'g denied, 420 U.S. 913, 95 S.Ct. 837, 42 L.Ed.2d 845 (1975). But see n. 11 infra and accompanying text.

III. A United States Supreme Court Procedural Ruling is not a precedential decision.

Initially, we must address the Tax Commission and Intervenors' contention, apparently adopted by the court below, that the United States Supreme Court's summary dismissal of *B & L* is binding precedent on this Court, regardless of our approval or disapproval of the Commerce Clause analysis contained in the opinion. In brief, the Attorney General asserts that "*B & L Motor Freight* is now a decision of the United States Supreme Court," and that "if it is to be overturned only the United States Supreme Court may do so."

We disagree and reject these contentions, because they float in the sea of frivolity. The United States Supreme Court has made it "quite clear" [8] that its

> summary dismissals are, . . . , to be taken as rulings on the merits, . . . , in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.' *They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits*, ... A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. *It does not, as we have continued to stress, . . . , necessarily reflect our agreement with the opinion* of the court whose judgment is appealed. *It is not at all unusual for the Court to find it appropriate to give full consideration to a*

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[8] *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979). In the same vein, we stated this limitation in *Turpen v. Okla. Corp. Comm'n*, 769 P.2d 1309, 1315 (Okl. 1988): summary dispositions are a "source of authority for state courts, but the precedential weight of that summary disposition is confined to the narrowest possible grounds."

> *question that has been the subject of previous summary action.* [Emphasis added] [Citations omitted].

Where the constitutionality of a state statute is questioned, summary actions by the Supreme Court of the United States, except for their persuasive value, have no final or binding effect on this Court. Nor can such summary actions be regarded as precedent in later cases presenting the precise question previously subjected to summary action.[9] It is the prerogative of this Court to determine whether this State's statutes pass constitutional muster. As previously stated, "[t]he interpretation of state legislation and the 'construction placed upon state statutes by our highest court is binding upon the United States Supreme Court.' "[10]

In the instant case, *B & L* is irrelevant, because the New Jersey Supreme Court has agreed with one of its lower courts in overruling *B & L*. In striking down New Jersey's third tier taxes and fees that state's Superior Court, Appellate Division, agreed with the Supreme Judicial Court of Maine's assessment and concluded:

> While we entertain doubts about whether the discrimination question was decided in that case, we need not decide the issue because we are satisfied that in any event *B & L* must yield to supervening doctrinal development, . . . , which requires a different result.[11] [Emphasis added.]

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[9] Id.

[10] *Ingram v. Oneok*, 775 P.2d 810, 813-14 (Okl. 1989), quoting *United States v. Home Federal S. & L. Ass'n of Tulsa*, 418 P.2d 319, 325 (Okl. 1966).

[11] *Private Truck Council v. State*, 221 N.J.Super. 89, 534 A.2d 13 (1987), aff'd per curiam "for the reasons expressed in the opinion of the Appellate Division," 111 N.J. 214, 544 A.2d 33 (1988). The Superior Court of New Jersey also noted that our district court's opinion, which heavily relied upon *B & L*, is the only decision "upholding a counterpart fee similar to New Jersey's." See *Private Truck Council*, supra, 534 A.2d, at 17 n. 4.

The Attorney General's contention that since 1972 "no doctrinal developments have occurred which would affect this issue," is inconsistent with the cases cited in brief.[12] Despite the fact that the United States Supreme Court struck down Pennsylvania's marker fee and axle tax as impermissible under the Commerce Clause,[13] the Attorney General, citing *Western and Southern Life Insurance Company v. State Board of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) as precedent, asserts that this Court should uphold the constitutionality of the challenged statutes, because "Congress has clearly expressed its intent to allow the States the power to tax interstate motor carriers free from attacks under the Commerce Clause." 49 U.S.C. § 10521. Admittedly, state regulation and taxation of insurance companies are not subject to Commerce Clause limitations because Congress has exempted the insurance industry from Commerce Clause coverage.[14] However, state taxation of motor carriers engaged in interstate commerce remains fully subject to the strictures of the Commerce Clause. The Supremacy Clause, U.S. Const., Art. VI, cl. 2, and the Attorney General's recognition of *Scheiner*, supra note 13, fully supports our conclusion.

IV. The questioned statutes are plainly discriminatory.

The Commerce Clause is the origin of Congressional authority "To regulate Commerce . . . among the several States, and with the Indian Tribes."[15] More important

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[12] See generally, *American Trucking Ass'ns, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986) (Upholding the constitutionality of Arkansas' Highway Use Equalization tax), vacated and remanded 483 U.S. 1014, 107 S.Ct. 3252, 97 L.Ed.2d 752 (1987), rev'd on remand as a violation of the Commerce Clause, 295 Ark. 43, 746 S.W.2d 377 (1988).

[13] See *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987).

[14] See McCarren-Ferguson Act, 15 U.S.C. § 1011, et seq.

[15] U.S. Const., Art. I, § 8, cl. 3.

for the purposes of this appeal, the Clause also implicitly limits the State's power to discriminate against interstate commerce.[16] The fundamental "purpose of the Commerce Clause was to create an area of free trade among the several States." [17] The essential tenet of the Commerce Clause is that no State may practice economic protectionism by imposing "a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." [18] In its continuous task of defining the limits of the Commerce Clause on State power, the Supreme Court has observed: [19]

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects.

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[16] *H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525, 532-533, 69 S.Ct. 657, 662, 93 L.Ed. 865 (1949); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). "[E]ven in the absence of a congressional exercise of this power, the Commerce Clause 'prevents the States from erecting barriers to the free flow of interstate commerce.'" *American Trucking Ass'n, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir.) [quoting *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978)], cert. denied, 459 U.S. 1036, 103 S.Ct. 448, 74 L.Ed.2d 603 (1982).

[17] *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct. 1023, 1026, 88 L.Ed. 1304 (1944).

[18] *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 264, 268, 104 S.Ct. 3049, 3052, 82 L.Ed.2d 200 (1984).

[19] See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977), quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 95 L.Ed. 329, 71 S.Ct. 295 (1951).

As the district court aptly noted, the Supreme Court of the United States has set forth a four-prong test for determining the validity of state statutes affecting interstate commerce: a state tax will pass constitutional muster only if (1) the activity being taxed has a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state.[20] Although the district court restated the preceding four-part test in its opinion, it did not scrutinize the challenged statutes under all four parts of the test. It is apparent that the district court erred in denying Truckers' constitutional attack.

Obviously, as asserted by Truckers, Oklahoma's retaliatory statutes do not pass the third and fourth prongs. Both statutes impose excessive fees and taxes on out-of-state registered motor carriers that are not imposed on Oklahoma registered motor carriers. "[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause." [21]

Appellees' contention that the mirror taxes and fees are fairly related to the services provided by the state, that is, the cost of construction and maintenance of Oklahoma's highway system, is unavailing. All motor carriers, having paid one state's registration fee, are free to travel all the roads in that jurisdiction, and are entitled to freely operate in the interstate market by mak-

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[20] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 271, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). See also, *Maryland v. Louisiana*, 451 U.S., at 754, 101 S.Ct., at 2133.

[21] *Scheiner*, 483 U.S. at 286, 107 S.Ct., at 2841. See also, *American Trucking Ass'ns, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), cert. denied, 483 U.S. 1020, 107 S.Ct. 3262, 97 L.Ed.2d 761 (1987); *Department of Revenue v. Private Truck Council of America, Inc.*, 531 So.2d 367 (Fla.App. 1 Dist. 1988).

ing commercial entrances into all the States.[22] Appellees' argument must fail because they confuse a tax on the privilege of using this State's highways with a tax on the privilege of engaging in interstate commerce. "[T]he Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." [23]

In considering the state's entire scheme of taxation, we note that Oklahoma does not impose any complementary or offsetting taxes on comparable intrastate motor carriers engaged in interstate commerce.[24] Neither the Tax Commission nor Intervenors have shown that such a compensatory tax exists in Oklahoma. Finding no equality of treatment between local in-state and out-of-state interstate commerce carriers, we must conclude that the ultimate effect of the statutes are not compensatory in nature, because they favor intrastate business interest.[25]

Next, we reject the Tax Commission's adverse dollars and cents "cost-impact" argument. In the present case, no record establishing the economic burden of the chal-

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[22] *Scheiner*, 483 U.S., at 283, 107 S.Ct., at 2840. See also, *Private Truck Council of America*, 517 A.2d, at 1154.

[23] *Scheiner*, 483 U.S., at 282, 107 S.Ct., at 2839. Oklahoma's mirror taxes are indistinguishable from Pennsylvania's unapportioned flat tax. Consequently, the challenged taxes also fail to pass the "internal consistency test" imposed in *Scheiner* 483 U.S., at 284, 107 S.Ct., at 2840: "To pass the internal consistency test, a state tax must be of the kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.' (Citation omitted.) If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."

[24] See *Maryland v. Louisiana*, 451 U.S., at 756-58, 101 S.Ct., at 2134-135.

[25] Id., at 758-59, 101 S.Ct., at 2135.

lenged taxes on out-of-state carriers is required. The Supreme Court of New Hampshire, invalidating a similar New Hampshire tax,[26] observed that:

> A factual record delineating the greater burden on out-of-state vehicles is necessary only if the statute does not discriminate on its face. . . . . Knowledge of the amount of discrimination imposed by a statute is not necessary to decide that it discriminates. '*We need not know how unequal the tax is before concluding that it unconstitutionally discriminates.*' [emphasis ours].

We also find that the legislative purpose in enacting the challenged statutes and the district court's conclusion that such defensive measures are justified by their purpose runs afoul of the "very purpose of the Commerce Clause [in] creat[ing] an area of free trade among the several States." [27] Appellees' contention that the Legislature enabled the state's taxing scheme to cancel the discriminatory effect that other state taxes impose on Oklahoma based carriers is unpersuasive. Discrimination cannot be corrected by retaliatory discrimination.[28] Retaliatory legislation, designed to motivate a sister State to cease its alleged unconstitutional tax burden on interstate commerce, has no legitimate State purpose and is a wholly unacceptable legislative remedy.[29] The ap-

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[26] *Private Truck Council of America v. State*, 517 A.2d 1150, 1153-154 (N.H. 1986), quoting *Maryland v. Louisiana*, 451 U.S., at 760, 101 S.Ct., at 2136. See also, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540, reh'g denied 469 U.S. 912, 105 S.Ct. 285, 83 L.Ed.2d 222 (1984).

[27] *McLeod*, supra, n. 17.

[28] See *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920).

[29] *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976); *New Energy Co. v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988); *Private Truck Council*, 534 A.2d, at 17.

propriate remedy for another state's unconstitutional burden on interstate commerce in an action under the Commerce Clause itself.[30]

Truckers' challenge to the constitutionality of 47 O.S. § 1120(K) and 68 O.S. § 607.1 under the Commerce Clause must be upheld, and in that respect, we reverse the district court. We hold that both statutes violate the fundamental requirement of nondiscrimination against interstate commerce. There is no equality of treatment, because Oklahoma does not impose any compensatory tax on domestic carriers engaged in intrastate or interstate commerce. In light of our disposition of Truckers' discrimination claim, we find it unnecessary to fully address their constitutional challenge under the Privileges and Immunities Clause.[31]

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[30] *A & P Tea Co.*, 424 U.S., at 379-80, 96 S.Ct., at 931-32. "A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation." *Private Truck Council*, 503 A.2d, at 218. See also *Private Truck Council of America*, 517 A.2d, at 1154.

[31] In this class action, Truckers stand in the shoes of all non-Oklahoma businesses operating in interstate commerce as private motor carriers. However, in its corporate capacity, Truckers are not natural persons nor "Citizens of each State . . . entitled to all Privileges and Immunities of Citizens of the Several States." U.S. Const. art. IV, § 2, cl. 1. "Corporations are not entitled under article 4, § 2, Const. U.S., 'to all privileges and immunities of citizens in the several states.'" *Nelson v. Deming Inv. Co.*, 21 Okla. 610, 614, 96 P. 742, 743 (1908), citing *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 15 L.Ed. 451 (1856), and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181, 19 L.Ed. 357 (1869). See also *Western & Southern Life Ins. Co.*, 451 U.S., at 656, 101 S.Ct., at 2076-77. Consequently, we hold Truckers are not entitled to protection under the Privileges and Immunities Clause. While quite novel and innovative, we also reject Truckers' argument to create, here on appeal, a sub-class consisting only of the Griffises, so this court may address the Privileges and Immunities Clause claim of all other non-corporate members of this class action. Only a district court may certify a sub-class action. See 12 O.S.1985 Supp. § 2023(C)(4) [When appropriate: (a) an action may be brought or maintained

V. Truckers are entitled to a partial refund.

We now turn to the principal thrust of Truckers' appeal of the district court's opinion denying Truckers' request for refunds of all taxes previously paid pursuant to the challenged statutes. Truckers assert that they are entitled to a refund of all retaliatory taxes and fees pursuant to 42 U.S.C. § 1983. Nearly $12,000,000.00 was collected under the statutes from April, 1983 through October, 1987. We affirm the district court's denial of Truckers' federal claim for refunds under § 1983. Oklahoma has an adequate State remedy affording the requested relief.

The Commission argues that Truckers' requested relief is contrary to Oklahoma law. The Commission contends that Oklahoma law requires Truckers to pay the taxes under protest, and then file suit to recover the taxes so paid under this alleged misinterpretation of law.[32] The Commission seems to argue that a class action for refunds may not be brought in Oklahoma, for it asserts that Truckers' monetary relief, if any, is limited to a refund of taxes paid in 1984, and then only to the named motor carriers. The Commission desires this court to limit recovery to Circle W. Transportation and Roy E. Griffis in the amount of $1,265.00. Finally the Commission argues that the only other relief available to Truckers' class is a declaratory judgment as to the constitutionality of the statutes.

In our view, the Commission's argument totally misconceives the specific statutory provision authorizing an action for declaratory and injunctive relief, including abatement of the challenged taxes, and a refund. 68

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as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class]. See also *Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okl. 1984).

[32] *Sun Oil Co. v. Okla. Tax Comm'n*, 620 P.2d 896 (Okl. 1980).

O.S.1981, § 226. This special tax refund statute, § 226 (a), reads in part: "In addition to the right to a protest . . . , a right of action is hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law." This all-in-one legal remedy is further limited to cases "where the taxes complained of are 1) an unlawful burden on interstate commerce, 2) violative of Acts of Congress or the United States Constitution, or 3) in cases where jurisdiction is vested in any of the courts of the United States." [33] Truckers satisfied the first statutorily delineated criterion. Furthermore, Truckers gave proper notice on December 14, 1984, as required by § 226(b), and "service of process upon the Chairman of the Tax Commission" was properly made as mandated by § 226(c). The legal avenues for bringing an action under § 226(c) are not expressly limited, there is no requirement that a taxpayer seek and exhaust administrative remedies, nor is there any requirement that a taxpayer must pay the taxes under protest.[34] Truckers complied with the prescribed statutory method mandated by the legislature.

The Commission's argument also implicitly challenges the standing of Private Truck Council of America (PTCA), because PTCA is not itself an aggrieved taxpayer, and has suffered no concrete injury resulting from

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[33] *Cimarron Industries, Inc. v. Okla. Tax Comm'n*, 621 P.2d 539, 542 (Okl. 1980).

[34] Section 226(d) provides:

> Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.

However, § 226(d) is inapplicable to the instant cause inasmuch as it is a certified class action. Neither appellee nor intervenors have argued "that the trial court absued its discretion in certifying this class action." *Shores v. First City Bank*, 689 P.2d, at 301.

the challenged statutes. This contention is without merit. As we noted at the outset, PTCA is a voluntary business association, with 1,800 companies as members. See n. 1 supra. PTCA's associational standing to prosecute this action as the representative of its constituents is clear under prior decisions of the United States Supreme Court.[35] The Supreme Court of the United States "has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity." [36] In determining whether an association has standing, the United States Supreme Court has:

> recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[37]

With respect to Trucker's claim for declaratory and injunctive relief, we have no doubt that PTCA satisfies the above criteria. In its petition, PTCA alleged that many of its members are subject to the challenged taxes since its members have vehicles registered in states

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[35] *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *National Motor Freight Ass'n v. United States*, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). See, e.g., n. 44 infra. This court has also recognized the standing of an association to seek relief on behalf of it members: *Democratic Party of Oklahoma v. Estep*, 652 P.2d 271 (Okla. 1982); *Oklahoma Ass'n of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla. 1978).

[36] *Hunt*, 432 U.S., at 342, 97 S.Ct., at 2441.

[37] *Hunt*, 432 U.S., at 343, 97 S.Ct., at 2441.

against which Oklahoma retaliates; thus, PTCA's members would have standing in their own right to assert a justiciable case. The interests that PTCA seeks to protect are definitely germane to the 51 year old association's purpose. Finally, PTCA's Commerce Clause claim, request for declaratory and injunctive relief, and refunds does not require individualized proof of such claim, inasmuch as such financial information is readily available from the records of the Commission.

Consequently, we must determine the question as to whether our ruling is to operate (1) retroactively from the time the taxes were first collected in 1983, (2) quasi-prospectively from the date of the *Scheiner* decision, or (3) prospectively. In *Griggs v. State ex rel. Okla. Dept. of Trans.*,[38] we observed that:

> Retroactive operation of an overruling decision is neither required nor prohibited by the United States Constitution. Judicial policy determines whether, and to what extent, a new rule will operate retroactively. In *Chevron Oil Co. v. Huson*, [404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)], the United States Supreme Court isolated three factors for ascertaining when retroactivity of a new pronouncement should be restricted: (1) at the threshold, the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or on an issue of first impression whose decision is not clearly foreshadowed; (2) the court must weigh the merits and demerits of applying the rule retroactively by considering the rule's prior history, its purpose and effect, and whether retroactivity will further or retard its operation; and (3) the court must consider the inequity flowing from retroactive application, including unfairness and hardship to the parties.

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[38] 702 P.2d 1017, 1020 (Okl. 1985).

The Attorney General argues that if the tax statutes are declared unconstitutional, this court should make its decision prospective only and award no refunds. In analyzing Trucker's claim for retroactive application, the Attorney General relies heavily upon *First McAlester Corporation v. Okla. Tax Comm'n*,[39] and applies the three-prong test enunciated in *Chevron Oil Co.* to the instant case. The Attorney General concludes that a prospective remedy would be sufficient relief, because Truckers are freed from paying the taxes, and a retroactive judgment would be fiscally disruptive to the State of Oklahoma. Because tax statutes are strictly construed against the state,[40] the Attorney General has not met the state's burden of presenting the required equitable predicate for this court to adopt a rule of pure prospectivity in this exceptional case.[41]

We are not at all persuaded by the Attorney General's argument, for it is bottomed on the ill-fated premise concerning the binding effect of the United States Sureme Court's summary dismissal of *B&L*, which we rejected in Part III supra. *B&L* was not adopted by the Supreme Court, nor did it establish a new binding principle of law so as to constitute a clear change in Commerce Clause jurisprudence as established by previous Supreme Court decisions. Even if this court substituted a more plausible alternative for *B&L*, i.e., the *Scheiner* opinion, in our view, that decision does not represent a clear break with past Commerce Clause precedent.

Although it is true that the Supreme Court did not overrule any clear past precedent in *Scheiner*, we observe that such a requirement is non-sequitur under the approach articulated in *Chevron*.[42] It is our belief that

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[39] 709 P.2d 1026 (Okl. 1985).

[40] *Oklahoma Tax Comm'n v. McAfee*, 461 P.2d 602, 605 (Okl. 1969).

[41] *Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980).

[42] See *Gosa v. Mayden*, 431 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973).

the Supreme Court in *Scheiner* did decide an issue of first impression by declaring the revenue implementation methodology employed by Pennsylvania's unapportioned flat tax unconstitutional. But, we must also recognize that the Supreme Court implicitly concluded that its resolution of *Scheiner* was foreshadowed by a long line of precedent invalidating unapportioned flat taxes.[43] We also observe that previous state court decisions may have foreshadowed the *Scheiner* pronouncement.[44] Thus, the state of Oklahoma can not argue that it was surprised by the results reached in *Scheiner*. Nevertheless, for the purposes of this case, we hold that *Scheiner* did establish a new constitutional principle.

The Supreme Court's pronouncement was 'new' in the sense that it decisively impeded a tax revenue practice accepted and relied upon by a number of states. Although *Scheiner* did not expressly overrule Oklahoma's retaliatory tax statutes, we cannot ignore the fact that the Supreme Court denounced the purpose and effect of the statutes in question.[45] Given the explicitness of the *Scheiner* pronouncement, we find it difficult to conceive

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[43] *Scheiner*, 483 U.S., at 280-87, 107 S.Ct., 2838-842.

[44] *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), cert. denied 476 U.S. 1129, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986); *American Trucking Assn, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), cert. denied 483 U.S. 1020, 107 S.Ct. 3262, 97 L.Ed.2d 761 (1987); *Private Truck Council v. State*, 517 A.2d 1150 (N.H. 1986). See also *Commonwealth of Kentucky, Transportation Cabinet v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65 (Ky. 1988); *American Trucking Ass'ns, Inc. v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988); *Black Beauty Trucking, Inc. v. Indiana Dept. of State Revenue*, 527 N.E.2d 1163 (Ind. Tax 1988); *Owner-Operators Independent Drivers Ass'n of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989); *American Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1335 (Vt. 1989).

[45] "Such taxes can obviously divide and disrupt the market for interstate transportation services. In practical effect, . . . , the taxes are plainly discriminatory." *Scheiner*, 483 U.S., at 285-86, 107 S.Ct., at 2841.

and justify any continued good faith reliance upon the constitutionality of the laws after the *Scheiner* opinion. Nothwithstanding the state's limited reliance interest under the threshold *Chevron* factor, we believe that *Scheiner*'s newly established constitutional principle can not, without resulting in manifest injustice and inequity, be applied under a pure prospective approach.

The next factor of the *Chevron* standard is whether retroactive operation will further or retard the purpose of the Commerce Clause. The central "purpose of the Commerce Clause was to create an area of free trade among the several States." [46] As a practical matter, retroactive application would not necessarily advance the further development of Commerce Clause jurisprudence, because interstate commerce must pay its fair share of tax burdens for the governmental service it enjoys.[47] Furthermore, the Oklahoma Legislature has "a significant interest in exacting from interstate commerce its fair share of the cost of state government." [48] However, unlike the situation presented in *First McAlester*, the Commission has not informed this court that it ceased collecting the taxes after the *Scheiner* opinion. Truckers have paid and are paying more than their proportionate share of the tax burden imposed on those non-residents engaged in interstate commerce. Furthermore, in light of the *Scheiner* decision, no appellee has conceded that the disputed statutes are unconstitutional, nor has the Oklahoma legislature repealed the state tax law. We will not retard the implementation of the *Scheiner* decision. Under these circumstances, the purpose criteria tip towards retroactive application of *Scheiner*.

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[46] *McLeod*, sura, n. 17.

[47] *Maryland v. Louisiana*, supra, n. 5.

[48] *Department of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Co.*, 435 U.S. 734, 748, 98 S.Ct, 1388, 1398, 55 L.Ed.2d 682 (1978).

Considering the inequities presented, if this court afforded complete retroactive application, and ordered refunds with interest as provided by § 226(b), obviously, we would impose a significant financial hardship upon the State in exercising its governmental functions. This we decline. On the other hand, the fact remains that this court can not, consistent with constitutional limitations, retard the very purpose of the Commerce Clause by permitting the State to violate the Commerce Clause and reap the financial benefits under a discriminatory tax law. To allow this application of nonretroactivity would deter any taxpayer's incentive to challenge the tax laws, and in the instant case, deny Truckers the benefit of the ruling in *Scheiner*. Furthermore, this state's statutory refund provision would have no effect other than providing an illusory and empty victory. We can not allow the Commission to retain all funds collected after *Scheiner*. In light of the presumption of prospective application of state court decisions invalidating tax statutes,[49] and after a careful balance of the three *Chevron* factors, coupled with a showing of inequity on both parties in this exceptional case, we hold that Truckers are entitled to a partial refund pursuant to § 226. Truckers claim for refunds before June 23, 1987, the effective date of the *Scheiner* opinion, are denied.

Truckers also contend that they are entitled to attorneys fees as provided under 12 O.S. 1981 § 18(c) and 42 U.S.C. § 1988, including the costs of this action. Subsequent to Truckers' present action, the Oklahoma Legislature repealed § 18(c), with the adoption of this State's Pleading Code, 12 O.S. § 1101, et seq. Truckers cannot recover attorneys fees under a statute not applicable at the time they instituted this action, because they had no rights accrued thereunder.[50] Nor may Truckers recover

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[49] *National Can Corp. v. State of Washington Dept. of Revenue*, 749 P.2d 1286, 1292-293 (Wash. 1988).

[50] Okla. Const., Art. 5, § 54. See also *Gayman v. Mullen*, 58 Okla. 477, 161 P. 1051 (1916).

attorneys fees under § 1988 for the adjudicated Commerce Clause violation.[51]

The judgment of the district court is REVERSED. On their face, both §§ 1120(K) and 607.1 violate the fundamental requirement for nondiscrimination against interstate commerce. Pursuant to § 226(b), the Oklahoma Tax Commission, beginning with all taxes and fees collected after the 23rd day of June, 1987, shall determine what amount of refund is due, together with interest, and shall deposit that amount in an escrow account for the benefit of those individual taxpayers having paid such taxes after June 23, 1987. This cause is REMANDED to the district court for a final determination of interest as provided by statute from June 23, 1987, entry of judgment as to that amount, including notification to all class members as determined by the tax rolls of the Commission, and further proceedings not inconsistent with the views expressed herein.

Hargrave, C.J., Simms, Doolin, Kauger, Summers, JJ.—concur.

Lavender, J.—Concurs in result.

Opala, V.C.J.—Concurs in part; Dissents in part.

Hodges, J.—Dissents.

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[51] *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984); *Private Truck Council of America, Inc.*, 503 A.2d 214; *Private Truck Council of America, Inc. v. State of New Hampshire*, 517 A.2d 1150 (N.H. 1986); *State v. Private Truck Council of America, Inc.*, 371 S.E.2d 378 (Ga. 1988).

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On behalf of Themselves and all Others Similarly Situated,
Appellants,

v.

OKLAHOMA TAX COMMISSION, *et al,*
Appellees,

and

ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC.,
Intervenor.

CORRECTED ORDER

[Filed Sep. 27, 1990]

It is hereby ordered that rehearing is granted for this limited purpose. The typewritten opinion of this Court promulgated in the above styled case on the 28th day of June, 1990, be amended as follows:

Page 14, 1st full paragraph, line 19, " . . . remedies. *However, there is a requirement* that a taxpayer must pay the taxes under protest *or at the time of payment give notice of an intent to file a lawsuit.*[34] Truckers complied with the prescribed . . ."

Page 20, 2nd paragraph, line 5, ". . . collected *for the tax year 1987,** shall determine what . . ." A new foot-

note is added at the asterisk and it provides: The United States Supreme Court in *American Trucking Ass'ns* v. *Smith*, —— U.S. ——, 110 S.Ct. 2323, 110 L.Ed 2d 148 (1990), found that the critical event for prospectivity is not the payment of the money but the occurrence of the underlying transaction. It further found that it was more equitable to refund the taxes paid for the 1987-88 tax year because if States collect prior to 1987 for those taxes then the parties would not be allowed a refund.

Page 20, 2nd paragraph, line 8, ". . . taxpayers having paid such taxes. This cause is . . ."

Page 20, 2nd paragraph, line 10, ". . . as provided by statute from *the payment of the 1987 taxes*, entry of judgment as to . . ."

In all other respects the opinion of June 28, 1990, shall remain unaffected by this order.

DONE BY ORDER OF THE SUPREME COURT this 27th day of September, 1990.

/s/ Hargrave
Chief Justice

HARGRAVE, C.J., SIMMS, DOOLIN, KAUGER, SUMMERS, JJ., Concur; OPALA, V.C.J., LAVENDER, J., Concur in part, dissent in part.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, on behalf of themselves and all others similarly situated,
Appellants,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Appellees,

and

ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC.,
Intervenor.

ORDER OF CLARIFICATION

[Filed March 5, 1991]

Upon Joint Application by the parties to clarify the correction order, the correction orders entered herein on September 25, 1990, and September 27, 1990, are hereby WITHDRAWN.

The Court's typewritten opinion promulgated herein on the 28th day of June, 1990, is amended in the following particulars, to-wit:

The first complete grammatical paragraph on page 14, lines 19 and 20, are corrected to read:

". . . remedies. *However, there is a requirement* that a taxpayer must pay the taxes under pro-

test or *at the time of payment give notice of an intent to file a lawsuit.* Truckers complied with the proscribed . . ."

The second complete grammatical paragraph on page 20 of the typewritten opinion is stricken and the following paragraph, together with footnote is substituted therefore:

"The judgment of the district court is REVERSED. On their face both §§ 1120(K) and 607.1 violate the fundamental requirement for non-discrimination against interstate commerce. Pursuant to § 226 (b) the Oklahoma Tax Commission shall determine what amount of refund is due for tax periods or portions of tax periods occurring after June 23, 1987.[52] In the case of those taxes and fees reported and paid on the quarterly basis, for quarterly periods commencing July 1, 1987, and thereafter, together with interest. The refunds shall be paid in the manner and from the accounts as provided by 68 O.S. Supp. 1989, § 225(d).

"This cause is REMANDED to the District Court for a final determination of interest as provided by statute, calculated from the dates set forth in the pragraph, entry of judgment as to that amount, including notification to all class members as determined by the tax rolls of the Commission, and further proceedings not inconsistent with the views expressed herein."

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[52] The United States Supreme Court in *American Trucking Assns v. Smith*, —— U.S. ——, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990, found that the critical event for prospectivity is not the payment of the money but the occurrence of the underlying transaction. It further found that it was more equitable to refund the taxes paid for the 1987-88 tax year because if States collect prior to 1987 for those taxes then the parties would not be allowed a refund.

DONE BY ORDER OF THE SUPRME COURT IN CONFERENCE THIS 5th DAY OF MARCH, 1991

/s/ Opala
Chief Justice

OPALA, C.J., HODGES, V.C.J., LAVENDER, SIMMS, DOOLIN, HARGRAVE, WILSON, SUMMERS, J.J., CONCUR.

APPENDIX D

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, *et al.*,
Plaintiffs

vs.

STATE OF OKLAHOMA, *et al.*,
Defendants

and

ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC.,
Intervenor

MEMORANDUM OPINION

The plaintiffs, Private Truck Council of America, Inc., a nonprofit New York corporation, Circle W. Transportation, a Delaware corporation, and Roy E. Griffis, an unincorporated motor carrier registered in Arkansas, contend that Oklahoma Statutes 68 O.S.A. § 607.1 and 47 O.S.A. § 22.5 j (k) (now 47 O.S.A. § 1120 (K)) are unconstitutional as to them and the members of the class they represent, and they ask for declaratory and injunctive relief, for a refund of all taxes collected under these statutes and for attorneys fees.

In Count I of the petition, plaintiffs contend that these taxes are in violation of the Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution); in Count II they assert that these taxes violated the Privileges and Immunities Clause (Article IV, Section 2).

In Count III of their petition, plaintiffs seek damages under 42 U.S.C. § 1983 for violation of their constitu-

tional rights, and for attorneys' fees under 42 U.S.C. § 1988.

The statutes under attack impose taxes called "mirror" or retaliatory taxes and they are sometimes called "third structure" or "third tier" taxes. The effect of these statutes is to tax motor carriers which operate in Oklahoma but are base-registered in another State in the same manner and to the same extent that Oklahoma based carriers are taxed in that other State.

The plaintiffs have moved for summary judgment in their favor on the ground that there is no issue of material fact in issue, and that they are entitled to judgment as a matter of law.

I have previously held that Count III should be dismissed insofar as all corporate plaintiffs are concerned, for the reason that the privileges and immunities clause is not applicable to corporations. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed 2d 514 (1981).

Defendants have moved to dismiss Count III on the ground that the commerce clause does not secure rights cognizable under 42 U.S.C. § 1983. Though there is some authority arguable to the contrary, the most persuasive authority on this point, in my opinion is the case of *Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (3rd Cir. 1984). In that case it was squarely held that although the appellant was successful in its assertion that an Iowa statute was in violation of the Commerce Clause, this did not establish a deprivation of any right, privilege, or immunity secured by the United States Constitution within the meaning of 42 U.S.C. § 1983. It follows that Count III should also be dismissed insofar as all corporate plaintiffs are concerned.

Thus, the questions left to be decided are (1) whether or not the taxes violate the Commerce Clause; (2)

whether or not such taxes violate the Privileges and Immunities Clause insofar as the individual members of the Plaintiffs' class are concerned, and (3) If so, whether or not the individual plaintiffs are entitled to damages and attorney fees.

A tax analogous, in some respects, to the Oklahoma tax under attack here was a tax enacted by California against non-resident insurance companies. The constitutionality of that tax was considered in *Western, see supra.*

That case clearly held that such taxes are not a violation of the Equal Protection Clause of the 14th Amendment. It is not authority on the question of the validity of the tax under the Commerce Clause for the reason that Congress has given the State the power to regulate the insurance business; nor is it authority on the validity of the tax under the Privileges and Immunities Clause for the reason that the plaintiff in that case was a corporation, and that clause in inapplicable to corporations, *Western, supra* at 655.

The facet of that case which would seem to be helpful here is the view of the purpose and effect of such taxes taken by the court. Justice Brennan, in writing the opinion of the Court, quoted the California Court of Appeals in saying:

> "[T]he purpose of the retaliatory tax is to put pressure on the several states to impose the same tax burden on all insurance companies, foreign or domestic, and thereby encourage the doing of interstate business."

and at page 672:

> "But whether in fact the provision will accomplish its objectives is not the question: The Equal Protection Clause is satisfied if we conclude that the California legislature rationally could have believed that the retaliatory tax would promote its objective."

The Court concluded that it could not say that the California legislature's conclusion was irrational or even unreasonable.

The parameters of decision under the Commerce Clause are set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 326 (1977). It was there held that the practical effect, not the formal language of the tax statute should be considered by the courts, and that the tax should be sustained if:

1. It has a substantial nexus with the Taxing State;
2. It is fairly apportioned;
3. It does not discriminate against interstate commerce; and
4. It is fairly related to the services provided by the State.

In that case the appellant, a Michigan corporation, hauled automobiles which came by rail to Jackson, Mississippi to other points within the State. These automobiles had been shipped into Mississippi from assembly plants outside the State. The tax was five percent of the gross income of the business within the State. This tax was upheld as meeting all four of the criteria.

In *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981), a so-called "first use" tax imposed by the State of Louisiana on natural gas coming from the Outer Continental Shelf and passing through Louisiana to other States was held to violate the Commerce Clause since residents of Louisiana were lergely immune from this tax. The Court said that this tax provided direct commercial advantage to local business. The Supreme Judicial Court of Maine has recently considered the question of the validity of a law in that State which imposed a reciprocal or retaliatory tax, and concluded that such a tax is a constitutionally impermissible burden on interstate commerce. *Private Truck Council of America*,

Inc. et al. v. Secretary of State, 503 A.2d 214 (1986). In that case, the Maine Court simply held that the taxing statute was facially discriminatory because it levies a tax on certain foreign registered trucks which it does not levy against Maine-registered trucks. The Maine Court refused to accord any precedential value to a New Jersey case upholding such a tax. In that case the Supreme Court dismissed the appeal for want of a federal question. Three members of the Supreme Court would have noted probable jurisdiction and set the case for oral argument. *B & L Motor Freight, Inc. v. Heymann*, 293 A.2d 711, *aff'd without opin.*, 311 A.2d 184, *cert. denied*, 317 A.2d 707 (N.J. 1974), *app'l dism'd*, 419 U.S. 1042 (1974).

The opinion of the New Jersey Court was in a lower court, which very clearly and explicitly discussed the commerce clause at length, and concluded that the New Jersey statute did not violate the commerce clause.

The Maine Court consigned the action of the United States Supreme Court to a footnote, stating that such a summary disposition may mean only that the issues were not there refined with sufficient clarity, precision and certainty desirable before the Supreme Court undertakes review.

What would seem more probable since the United States Supreme Court has in the past upheld these reciprocal taxes was that the matter was no longer open to question. The New Jersey Court said *id.* at 715:

> Reciprocal (not retaliatory) features of state laws imposing taxes on motor vehicles came before the court in Bode v. Barrett, 344 U.S. 583, 73 S.Ct. 468, 97 L.Ed. 567 (1953) and in Storaasli v. Minnesota, 283 U.S. 57, 51 S.Ct. 354, 75 L.Ed. 839 (1931). In *Bode* the appellants were motor truck operators engaged in interstate as well as intrastate commerce. They attacked the constitutionality of an Illinois law imposing a tax for the use of that state's highways

> and measuring the tax exclusively by the gross weight of the vehicle. The law was held valid and among the arguments rejected by the court was this: That the statute should be held unconstitutional because it required Illinois residents to pay the tax and at the same time exempted non-residents if the states of their residence reciprocated by granting like exemptions to Illinois residents. *Storassli* was cited as controlling.

and further, *id.* at 716:

> State legislation which has the effect of regulating interstate commerce is sometimes valid, sometimes invalid. If the regulation takes the form of a reciprocal (retaliatory) statute, the use of that form will not make unconstitutional a state requirement which would otherwise be valid for a foreign corporation engaged in interstate commerce. This view of existing law is supported by In re Insurance Tax Cases., 160 Kan. 300, 161 P.2d 726 (1945), aff'd wtihout opinion Prudential Ins. Co. of America v. Hobbs, 328 U.S. 822, 66 S.Ct. 1360, 90 L.Ed. 1602 (1946). That decision followed the general rule and sustained insurance laws having a retaliatory feature.

It would seem that the view taken by the New Jersey Court is better reasoned and more in accord with the views of the United States Supreme Court.

It is the actual effect on interstate commerce that we must consider, not the form of the statute. It seems to me that the purpose of the reciprocal laws is to motivate all states to abandon excessive taxes on out-of-state truckers, and I am not willing to say that such laws are either an undue burden on interstate commerce or that they violate the privileges and immunities clause.

It is therefore the order and judgment of this court that the plaintiffs motion for summary judgment be overruled.

APPENDIX E

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-84-9902

PRIVATE TRUCK COUNCIL OF AMERICA INC., *et al.*,
Plaintiffs,

v.

STATE OF OKLAHOMA, *et al.*,
Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND ALTERNATIVE MOTION FOR ESCROW OF TAXES

[Filed Apr. 1, 1985]

This matter comes on for hearing in its regular order on the 29th day of January, 1985, upon plaintiffs' motions for a preliminary injunction prohibiting the defendants, during the pendency of this action, from assessing or collecting taxes and fees on motor carriers, pursuant to 68 O.S. Supp. 1982, § 607.1 and 47 O.S. Supp. 1982, § 22.5(K); or, in the alternative, for a temporary order of this Court impounding all funds collected thereunder into an escrow account and prohibiting the defendants from disbursing the proceeds of any and all such taxes and fees collected pursuant to said statutes.

All parties appearing by counsel, and the Court, having heard the arguments of counsel, having read the

pleadings, briefs, and memoranda of law filed in connection therewith, having examined the affidavits in support of said motions and the exhibits introduced, and being fully advised in the premises, the Court finds:

1. That plaintiffs have an adequate remedy at law;

2. That plaintiffs have failed to show that the denial of either of such motions will cause irreparable injury to plaintiffs; or that sufficient emergency exists to require the granting of either of such motions.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary injunction and alternative motion for escrow of taxes be, and hereby are DENIED.

/s/ William S. Myers, Jr.
Chief Judge

APPENDIX F

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-84-9902

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On Behalf of Themselves and all Others Similarly Situated,
Plaintiffs,

vs.

STATE OF OKLAHOMA, OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Individually as Chairman of the Oklahoma Tax Commission, ROBERT L. WADLEY, Individually and as Vice-Chairman of the Oklahoma Tax Commission, J.L. MERRILL, Individually and as Secretary-Member of the Oklahoma Tax Commission, and LEO WINTERS, Individually and as State Treasurer of Oklahoma,
Defendants.

TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS had before the Honorable William S. Myers, Jr., Judge of the District Court of Oklahoma County, Oklahoma, on the 29th day of January, 1985.

[2] APPEARANCES

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F. Andrew Fugitt
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112 State Capitol Building
Oklahoma City, OK 73102

Mr. Stanley Johnston
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Legal Division
M.C. Connors Building
Oklahoma City, OK 73105

[3] (Thereupon, and on the 29th day of January, 1985, with Mr. Rogers, Mr. Billig and Mr. Allen appearing as counsel for the Plaintiffs and Mr. Spencer, Mr. Fugitt and Mr. Johnston appearing as counsel for the Defendants, the following is the ruling of the Court:)

THE COURT: Are we ready for the Court's ruling? Apparently so.

I want to thank counsel for their briefs and for the fine manner in which they presented their argument to the Court.

I do think that Plaintiff's characterization of the tax as retaliatory is correct. I think that ultimately, these taxes, where a state imposes a burden on interstate commerce to get even for what has been done to its truckers, will be struck down and will cease to exist.

I think ultimately, the Plaintiffs will probably prevail in this case. There are other questions, of course, that go to whether this Court should grant an Injunction, be it a Temporary Injunction, and also whether the Court should impound funds.

One thing that I think is very important is the fact that this has been collected for nearly two years already and I'm looking to see the emergency nature of it. I am most confident that there will be an appeal from either party who does not prevail when the matter is decided ultimately on the merits by the assigned judge and this should take place, I would think, within the next thirty to sixty days, considering the speed with which such matters are decided.

I think that there is substantially an adequate remedy provided by law. I recognize it doesn't cover the cost of preparing the necessary paperwork which all businessmen are inundated with today. Considering the very small amount that is involved on any one individual in the next thirty to sixty days and weighing that, to some extent, against the myraid of problems that would be created by an impoundment on a temporary basis prior to the resolution of this matter on its merits, I am going to decline to grant the Temporary Injunction or to impound funds.

However, I will talk to the assigned judge and explain to him the fact that there should be a decision made on it promptly and see if he can't give you a quick hearing date on the merits.

Thank you.

(END OF PROCEEDINGS.)

APPENDIX G

47 O.S. Supp. 1986 § 1120(K) provided in pertinent part:

> In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sale, use or mileage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

68 O.S. Supp. 1982 § 607.1 provided in pertinent part:

> In addition to those taxes or fees imposed by Articles 5, 6, and 7 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise sales, use or mileage tax required by the laws of such other state making the same or similar use of a like vehicle in such state.

APPENDIX H

NON-WHOLLY OWNED SUBSIDIARIES OF WESTINGHOUSE ELECTRIC CORPORATION

ADEPT Technologies

AEG-Beteiligunagesellschaft MBH

AEG-Westinghouse Transportation Systems, Inc.

Airship Industries, Ltd.

CEEC Investments Incorporated

Challenger Electrical Equipment Corporation

CEEC Holdings Incorporated

Computer Aided Training Company, Incorporated

Cypher Communications Technology, Inc.

Edge Emitter Technology, Inc.

Eletromar Industria Eletrica Brasileira, S.A.

Eletromar Nordeste, S.A.

Email Westinghouse Pty., Limited

Enwesa Servicos, S.A.

Eregli Demir ve Celik Fabrikalori, A.S.

Escorts, Ltd.

Gamma Metrics

Industria IEM, S.A. de C.V.

Infrared Fiber Systems, Inc.

Inova Microelectronics, Inc.

Integrated Communication Systems, Inc.

Alma Industries

Corporate Interiors, Inc.

Beaux Arts Group of Florida, Inc. (The)

Corporate Environments of Minnesota, Inc.

Corporate Environments of Tennessee, Inc.

Stillman/Estes, Inc.

Gaviform

Knoll International (SEA) Ltd.

Knoll Hong Kong PTE Ltd.

Knoll Malaysia Sdn. Bvd.

Lyn (PTE) Limited

Topform Postforming (PTE) Ltd.

Shaw-Walker Company (The)

Mecanica Pesada, S.A.

Mex Control S.A. de C.V.

Micros Systems Inc.

Photocomm, Inc.

Powerex, Inc.

Project Funding Corporation

Serratosa & Castells, S.A.

Shaw-Walker Company, The

Siam Toracato de Tella, Ltd.

Silectra S.A. de C.V.

Speech Plus

Texas PFC, Inc.

Theta J. Corporation

Turbine Metal Technologies, Inc.

United Western Technologies Corp.

Vektron S.A.

WB Bottling Corporation

W.S. Industries (India) Ltd.

Westinghouse-Airship Industries, Inc.

Westinghouse de Argentina, S.A.

Group W. Radio, Inc.

Metron, Inc.

Herbinger*EDI Services, Inc.

Westinghouse Electro Metalurgicas C.A. (WEMCA)

Westinghouse do Brasil S.A. (WEBSA)

Eletromar Industria Electrica Brasileira, S.A.

Westinghouse Electric Australia Holdings Limited

Email Westinghouse Private, Ltd.

Email Westinghouse Properties

Contadores Electricos, C.A. (CONTELCA)

Elektrik Technizati Imalti Tesisati, A.S.

Horiba Westinghouse, Ltd.

Hyosung Heavy Industries, Ltd.

Industria Electrica de Mexico, S.A.

Industria IEM, S.A. de C.V.

Industria et Technologie de la Machine Intelligentie (ITMI)

ISCOSA Industries and Maintenance, Ltd.

Mex Control, S.A. and C.V.

Reftrans, S.A.

Silectra, S.A. de C.V.

Societe Generale de Travaux Electriques (SGTE)

ETIC BV Rotterdam

Westinghouse de Argentina, S.A.

Westinghouse Asia Controls Corporation (WEASIA)

Westinghouse Electric Australia Holdings Limited (WEAHL)

Cemac Westinghouse Pty. Ltd.

Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)

Societe Generale de Travaux Electriques (SGTE)

Westinghouse Plasma Systems International, N.V.

Westinghouse Saudi Arabia Ltd. (WSAL)

Integrated Sensors, Inc.

Jerry Thompson & Associates, Inc.

Westinghouse Industria Electrica Brasileira S.A.

Westinghouse Motor Company

WEXICO Systems and Services, Ltd.

(2)

No. 90-1597

Supreme Court, U.S.
FILED
MAY 15 1991
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In The

Supreme Court of the United States

October Term, 1990

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Respondents disagree with petitioners' characterization of the questions presented. The Oklahoma Supreme Court, concluding that "Oklahoma's mirror taxes are indistinguishable from Pennsylvania's unapportioned flat tax" which this Court struck down in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), held those mirror taxes unconstitutional and ordered a refund of all such taxes paid for periods occurring after the date of the *Scheiner* decision.

The question presented here, therefore, is whether the Oklahoma Supreme Court correctly concluded that *Scheiner* should be applied prospectively from its date.

Since this Court has answered that question in the affirmative, this case presents no compelling reason for review.

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In The

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Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

In an opinion rendered on June 28, 1990, clarified on limited rehearing on March 5, 1991, the Oklahoma Supreme Court declared invalid Oklahoma's statutes imposing a tax designed to mirror certain "third structure" highway taxes, such as Pennsylvania's axle tax, struck down by this Court in *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266 (1987), and Arkansas' Highway Use Equalization tax, declared unconstitutional after remand in *American Trucking Assns, Inc. v. Gray,* 483 U.S. 1014 (1987).

The Oklahoma court concluded that Oklahoma's mirror taxes were "indistinguishable from Pennsylvania's unapportioned flat tax" (Pet. App. 14a, n.23), and that this Court in *Scheiner* had "denounced the purpose and effect of the statutes in question." (Pet. App. 22a). Concluding as it had that, under the principles announced in *Scheiner,* the challenged statutes could not stand, the court went on to determine whether its ruling was "to operate (1) retroactively from the time the taxes were first collected in 1983, (2) quasi-prospectively from the date of the *Scheiner* decision or (3) prospectively." (Pet. App. 20a)

Applying the guidelines announced by this Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the court concluded that its decision invalidating these taxes should be applied prospectively from the date of the *Scheiner* decision, and ordered refunds of taxes paid for tax periods or portions of periods occurring after that date. Petitioners' claim for attorneys' fees under 42 U.S.C. §1988, however, was denied.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS CORRECTLY BASED ON *SCHEINER*

The Oklahoma Supreme Court correctly noted that this Court in *Scheiner* had condemned not only Pennsylvania's axle tax and other similar flat taxes adopted by other states, but also those retaliatory levies exacted by states such as Oklahoma to mirror those flat taxes. *See*

Scheiner, 483 U.S. at 285. While this Court had not previously spoken as to these taxes, the Oklahoma court concluded that these mirror taxes "are indistinguishable from Pennsylvania's unapportioned flat tax." (Pet. App. 14a) The court went on to add:

> Although *Scheiner* did not expressly overrule Oklahoma's retaliatory tax statutes, we cannot ignore the fact that the Supreme Court denounced the purpose and effect of the statutes in question. (Pet. App. 22a).

This Court recognized that the retaliatory levies by states such as Oklahoma go hand-in-glove with the third structure taxes they are designed to mirror. It is thus clear that the Oklahoma Supreme Court was correct in its reliance upon the principles announced in *Scheiner* in deciding the constitutionality of Oklahoma's mirror taxes.

The only question remaining as to this issue, then, is whether the Oklahoma Supreme Court correctly determined the appropriate application of the *Scheiner* decision to the issue of refunds. This Court has already answered that question in the affirmative.

II. THE *SCHEINER* DECISION WAS CORRECTLY APPLIED PROSPECTIVELY

Applying the standard announced in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the Oklahoma Supreme Court concluded that its decision, commensurate with this Court's decision in *Scheiner,* should operate quasi-prospectively, i.e., from the date of *Scheiner.* While petitioners seem to question the continued vitality of the

Chevron Oil standard, this Court has confirmed that retroactivity of decisions in the civil context continues to be governed by this standard. *American Trucking Assns., Inc. v. Smith,* 110 S.Ct. 2323, 2331 (1990).

Having justifiably and properly determined the constitutional issues in light of this Court's decision in *Scheiner,* the Oklahoma Supreme Court next examined the *Scheiner* decision under the *Chevron Oil* standard. First, the court concluded that *Scheiner* announced a new principle of law. That determination has already been vindicated by this Court's identical conclusion in *Smith. Id.,* 110 S.Ct. at 2331.

Next, the court considered whether retrospective operation of its decision beyond *Scheiner* was necessary to the furtherance of the principle there announced. Its decision that "[a]s a practical matter, retroactive application would not necessarily advance the further development of Commerce Clause jurisprudence" (Pet. App. 23a) is, again, fully in accord with the decision of this Court in *Smith. Id.,* at 2332.

Finally, in weighing the inequity imposed by complete retroactive application, the Oklahoma Supreme Court found that such "would impose a significant financial hardship upon the State in exercising its governmental functions." (Pet. App. 24a). This the court declined to do, which is fully consistent with *Chevron Oil.*

Contrary to petitioners' assertions, it is clearly seen that the decision below was made, not on financial considerations alone, but rather after careful examination of each factor of the *Chevron Oil* test. It is further abundantly clear that the result of that examination, applying *Scheiner*

prospectively from its date and ordering refunds accordingly, is directly in accord with this Court's decision in *Smith*.

III. THE DECISION BELOW DENYING ATTORNEYS' FEES UNDER 42 U.S.C. §1988 WAS CONSISTENT WITH CLEAR PAST PRECEDENT, UPON WHICH THE LITIGANTS AND THE COURT COULD REASONABLY RELY

The trial court denied petitioners' claim for attorneys' fees under 42 U.S.C. §1988, and the Oklahoma Supreme Court affirmed, relying on *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 469 U.S. 834. That ruling was also consistent with the Tenth Circuit decision in *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985). That that clear past precedent was recently overruled in *Dennis v. Higgins*, 119 S.Ct. 865 (1991), should not, especially in light of the guidelines of *Chevron Oil*, form any basis for review.

The overruling of this clear past precedent, upon which parties litigant, state legislatures and both state and federal courts have relied, clearly satisfies the first prong of the *Chevron Oil* test for prospective application. Further, petitioners here make neither showing nor suggestion that retrospective application of *Dennis* to the case at bar is in any way necessary to the furtherance of the new rule there announced. Finally, respondents suggest that *Dennis*, if applied retrospectively to this case, would only produce substantial inequitable results.

Considering this case as a whole, *Dennis* should provide no reason for review.

CONCLUSION

The decision of the Oklahoma Supreme Court, ordering refunds of the challenged taxes for tax periods or portions of periods occurring after the date of the *Scheiner* decision, was proper, correct and in accord with applicable decisions of this Court; and further review is not warranted.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

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Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

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No. 90-1597

In The

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October Term, 1990

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,[1]

v.

OKLAHOMA TAX COMMISSION, et al.,

Respondents.[2]

Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

1. Respondents attempt to justify the Oklahoma Supreme Court's limiting the retroactive effect of its decision to June 23, 1987, when this Court decided *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), by arguing that the *Scheiner* decision is what rendered Oklahoma's retaliatory tax

[1] National Private Truck Council, Inc. is a trade association and has no subsidiaries. The non-wholly owned subsidiaries of Westinghouse Electric Corporation are listed in App. H to the Petition for a Writ of Certiorari.

[2] Respondents are the Oklahoma Tax Commission and the following members of the Commission: Robert E. Anderson, Chairman, Robert L. Wadley, Vice Chairman, and Don Kilpatrick, Secretary-Member. The individual respondents are successors in office to other officials whom petitioners had sued in their official capacities for declaratory and injunctive relief.

unconstitutional. (Br. in Opp. at 2-3.) That argument is groundless. The retaliatory taxes in this case discriminated on their face against trucks registered in other states. They were thus unconstitutional under principles that were well established long before *Scheiner*, which concerned taxes that were nondiscriminatory on their face but discriminatory in effect. The fact that one of the taxes that Oklahoma was retaliating against – Pennsylvania's axle tax – was invalidated in *Scheiner* was completely irrelevant to the validity of Oklahoma's taxes.

Indeed, the Oklahoma Supreme Court itself appeared to recognize as much when it held that Oklahoma's retaliatory taxes were "plainly discriminatory" (Pet. App. 11a), and "[o]bviously do not pass the third and fourth prongs [of the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 271 (1977)]." (*Id.* at 13a.) That holding was based on the simple fact that Oklahoma's retaliatory tax statute "impose[s] excessive fees and taxes on out-of-state registered motor carriers that are not imposed on Oklahoma registered motor carriers." (*Id.*) Furthermore, that court correctly held that retaliatory legislation like Oklahoma's is constitutionally impermissible *per se*, whether or not the actions of the other states that they are retaliating against are themselves unconstitutional, and correctly cited *Travis v. Yale & Towne Mfg. Co.*, 250 U.S. 60 (1920) and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), among other cases, for that proposition.

That the *Scheiner* decision had no bearing on the unconstitutionality of Oklahoma's retaliatory taxes is also evident from the fact that many of the taxes of other states that they retaliated against were not invalidated by *Scheiner*, such as the distance-based taxes imposed by Ohio, New York, Arizona and other states. The Oklahoma Supreme Court, however, correctly invalidated Oklahoma's retaliatory taxes in their entirety, regardless of the type or validity of the taxes they were retaliating against.

2. Respondents also argue that this Court's decision in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) should not be applied to this case but should be made prospective only because it overruled earlier decisions of the Eighth Circuit and the Tenth Circuit, which respondents characterize as "clear past precedent."[3] (Br. in Opp. at 5-6.) This argument is meritless. Before the *Dennis* decision there was a conflict among the circuits,[4] and the law was, at best, unsettled.

Prospective application of a decision is an exception to the general rule, and it is warranted only where, as a threshold matter, the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). This Court's resolution of a conflict among the lower courts does not amount to "overruling clear past precedent." It is also difficult to see how respondents could have "relied" on the proposition that Commerce Clause violations were not actionable under 42 U.S.C. § 1983. Furthermore, the Court's opinion in *Dennis* makes clear that its decision *was* foreshadowed by — indeed was squarely based upon — many prior decisions under the Commerce Clause and § 1983. Accordingly, petitioners submit that *Dennis* does not meet even the threshold requirement for prospective application. If there were any substantial question with respect to respondents' contention, however, it would still be an important question warranting this Court's review.

---

[3] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1138 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984); *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985).

[4] *Compare Consolidated Freightways Corp. v. Kassel, supra*; *J&J Anderson, Inc., supra*; and *Kraft v. Jacka*, 872 F.2d 862, 869 (9th Cir. 1989) with *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), vacated on other grounds, 494 U.S. ____, 110 S.Ct. 1249 (1990); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); and *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 1991